Supreme Court, U.S.
FILED

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No. _____

# In the Supreme Court of the United States

P.V. PATEL, M.D., INDIVIDUALLY; P.V. PATEL, M.D., A PROFESSIONAL ASSOCIATION; THE HEART CENTER; ECHO LAB INCORPORATED; ASSOCIATES OF MIDLAND CARDIOVASCULAR & INTERNAL MEDICINE, A PROFESSIONAL ASSOCIATION, A/K/A MIDLAND CARDIOVASCULAR,
*Petitioners*,

v.

PERMIAN CARDIOLOGY GROUP, ET AL.,
*Respondents*.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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84 pp

## QUESTIONS PRESENTED

1. Whether the court erred in holding that the amendment to the Civil Rights Act of 1991, 42 U.S.C.A. §1981 does not authorize suits for damages against municipalities and its officers for discrimination on the basis of race or ethnic origin in Petitioner's right to make and enforce contracts.

2. Whether the court erred in holding that a physician with a protected property interest in his privileges at a public hospital was not entitled to any pre-suspension procedural due process where there was no proof of an imminent danger or that it was impractical to provide procedural due process.

3. Whether the court applied an erroneous standard of review by adopting Respondents' version of the evidence in a summary judgment case contrary to *Reeves v. Anderson Plumbing Products, Inc.*, 430 U.S. 133 (U.S. 2000).

4. Whether the court erred in holding that there was no direct or indirect evidence of racial discrimination against Petitioner's right to make and enforce contracts where Petitioner, who is of Indian descent was publicly referred to at the hospital as a "sand nigger" and "camel jockey" by one of the Respondent's who wrote an adverse report under the cardiology section chief's name which contained significant errors and was published to the hospital officials and was a dominant cause of his erroneous suspension.

5. Whether the courts erred in holding that the Local Government Anti-Trust Act of 1984, 15 U.S.C.A. §§34-36 and its Texas counterpart 4 Tex. Bus. & Com. Code

§15.05(g) provide absolute immunity to Respondents from anti-trust damages.

6. Whether the courts erred in refusing to rule upon Petitioner's challenge to the constitutionality of the Health Care Quality Improvement Act, 42 U.S.C.A. §111101, et seq. and its Texas counterpart, §160.010, Texas Occupational Code and §161.033, Texas Health & Safety Code since (a) Congress exceeded its powers under the Commerce Clause of the U. S. Constitution to enact legislation to regulate hospital credentialing of physicians which is a purely local matter, and (b) these acts which provide immunity from a suit for damages arising out of peer review deny Petitioner's right of access to the open courts, a fundamental constitutional right protected by the equal protection and due process clauses of the United States Constitution, as well as the equal protection, due process and due course of law protections of the Texas Constitution.

7. Whether the courts erred in granting summary judgment on Petitioner's pendant state claims of breach and/or interference with contracts and defamation.

## PARTIES TO THE PROCEEDING

### Petitioners

1. P. V. Patel, M.D., an individual citizen of the United States, residing in the Western District of Texas.

2. P. V. Patel, M.D., A Professional Association; The Heart Center; Echo Lab Incorporated; Associates of Midland Cardiovascular and Internal Medicine, A Professional Association, a/k/a Midland Cardiovascular.

The above Petitioners were Plaintiffs in the trial court, and Appellants-Cross-Appellees in the Fifth Circuit Court of Appeals.

### Respondents

1. Permian Cardiology Group; Stephen Brown, M.D. and Michael Miller, M.D., Defendants - Appellees-Cross-Appellants.

2. Midland Memorial Hospital and Medical Center; Memorial Heart and Vascular Institute; Jay Mendez, M.D.; Donald Loveman, M.D. and Harold Rubin, Defendants - Appellees-Cross-Appellants.

The above Respondents were Defendants in the trial court, and the Appellees-Cross-Appellants in the Fifth Circuit Court of Appeals.

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Petitioners respectfully petition for a Writ of Certiorari to review the judgment of the Fifth Circuit Court of Appeals in this case.

## OPINIONS BELOW

The Fifth Circuit opinion (App. A at 1a) is reported at ____ F.3d ____ (2002 WL 14272762) (5th Cir. 2002). The District Court opinion (App. B at 3a).

## STATEMENT OF JURISDICTION

The judgment of the Fifth Circuit Court of Appeals was entered on July 10, 2002 and an Order denying a timely Petition for Rehearing was entered on August 6, 2002.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following statutory provisions:

A. 42 U.S.C. §1981, Civil Rights Act of 1991.

B. 42 U.S.C. A. §11101 et. seq., Health Care Quality Improvement Act and its Texas counterpart Texas Occupational Code Ann. §160.010(a) (V.T.C.S.), and §161.033 Texas Health & Safety Code (V.T.C.S.).

C. United States and Texas anti-trust laws, 15 U.S.C.A. §§1 abd 2 and 4 Texas Business & Commerce Code §15.05.

D. Local Government Anti-Trust Act of 1984, 15 U.S.C.A. §§34-36 (2000) and its Texas counterpart, 4 Texas Business & Commerce Code §15.05(g) (V.T.C.S.).

E. The equal protection and due process clauses of the 5th and 14th amendments to the United States Constitution as well as their counterparts in Article 1 §§13 and 19 of the Texas constitution.

F. The Commerce Clause contained in the 8th amendment to the United States Constitution.

## STATEMENT OF THE CASE

Petitioners, P. V. Patel, M.D. and his affiliated medical groups and a heart surgical center under construction sued Respondents which included a county hospital, a competing group of cardiologists with Permian Cardiology and a heart institute as well as some members of the hospital's Executive and Credentials' Committees for damages caused by the summary suspension of all of his clinical and medical staff privileges at Midland Memorial Hospital from January 19, 1999 through approximately November, 1999.

Dr. Patel is of Indian ethnic origin and is an invasive and interventional cardiologist who had been a member of the staff at Midland Memorial Hospital, a public hospital, since the early 1980s. By the late 1990s he had become very successful and the highest volume interventionalist at the hospital. He had performed thousands of interventions over the years and did more than 50% of all interventions done at the hospital including angioplasty, the placement of stents and rotablater procedures. He had his own free standing lab and announced plans to build a heart hospital which would directly compete with the hospital in the performance of invasive and

interventional cardiovascular procedures. His success fueled jealousy on the part of his competitors. In 1997 a group of interventional radiologists wrote a report to the chief of the staff critical of Dr. Patel's "sons" technique, which Dr. Patel used less 1% of the time and which involved accessing the coronary arteries through a radial artery in the arm as opposed to the groin. Dr. Patel characterized the criticisms by the radiologists as being a struggle over turf because he did not refer enough work to them and the radiologists felt that the sons procedures should be exclusively done by them. He averred that he managed the cases well within the standard of care. In 1997 the hospital restricted Dr. Patel's privileges so that he could not perform the sons technique until there was a hearing. All of the remainder of Dr. Patel's clinical and medical staff privileges remained intact. Throughout 1998 he performed well over 300 coronary interventions at the hospital.

Following the restriction of his "sons" privileges, in early 1998 the chief of staff asked Dr. Brown, the section chief of cardiology to "look into" Dr. Patel's cardiac practice even though there were no complaints about his cardiac practice. It was undisputed that the quality review procedures at the hospital which resulted in all of the cardiologists' charts being reviewed had never resulted in any recommendation against Dr. Patel's privileges. These included monthly chart reviews by the Cardiovascular Committee. Dr. Brown was a member of a competing group of cardiologists, Permian Cardiology, and in June, 1998 he delivered a report to the then chief of staff which contained criticisms of six interventional cases, even though four had previously been approved by the Cardiovascular Committee for acceptable morbidity and mortality. In this report Dr. Brown wrote that he and other members of the staff would probably be precluded based upon an appearance of a conflict of interest

from conducting further reviews and he suggested an outside reviewer should look into the matter. The hospital officials took no action based upon Dr. Brown's report and Dr. Patel continued to practice at the hospital. Contrary to his report where he stated he and other staff members were conflicted from doing further reviews, acting on their own, in October, 1998, Dr. Brown and two of his partners with Permian Cardiology, met and reviewed four more cases managed by Dr. Patel. They claimed to have been meeting not in their capacity as Permian Cardiology partners, but rather as the Cardiovascular Committee, however, it was undisputed the Cardiovascular Committee consisted of thirteen members and no other members other than the three Permian Cardiology partners participated in the reviews. Notwithstanding Dr. Brown's prior written statement that he and other staff members probably had a conflict of interest from conducting further reviews, not only did these Permian competitors conduct the reviews, Dr. Miller volunteered to write a report to the chief of staff. Dr. Miller wrote a letter dated November 6, 1998, under Dr. Brown's signature, which Dr. Brown never reviewed and which contained criticisms of four cases and substantial case fabrications. Not only was this not a report from the Cardiovascular Committee, it was false because the Committee had previously approved two of the cases for acceptable morbidity and mortality. A year or so prior to writing this report, Dr. Miller had publicly referred to Dr. Patel in the cath lab of the hospital as a "sand nigger" and a "camel jockey" in the presence of hospital personnel. The hospital officials did not immediately suspend Dr. Patel's privileges after receipt of these two reports.

At Permian Cardiology's suggestion an outside reviewer, Dr. Lange, was sent charts. He sent his report on January 13, 1999 to the hospital officials which reviewed ten cases, six of which had previously been approved by the

Cardiovascular Committee for acceptable morbidity and mortality. The report contained criticisms of Dr. Patel. On January 19, 1999 the hospital officials summarily suspended all of Dr. Patel's clinical and medical staff privileges without any prior notice, conference or an opportunity respond to the adverse reports of the internal reviewers and the external reviewer. In a post-suspension hearing, the panel unanimously ruled that Dr. Patel was not a danger and his clinical and medical staff privileges were restored in late October or early November, 1999.

Petitioners sought damages for the summary suspension of his privileges without pre-suspension due process entitling him to damages under 42 U.S.C.A. §1983; damages for the interference with his right to make and enforce contracts on the basis of race or ethnic origin in violation of 42 U.S.C.A. §1981; damages for monopolizing or attempting to monopolize invasive and/or interventional cardiovascular services in the relevant market in violation of the anti-trust laws, 15 U.S.C.A. §§ 1 and 2 and 4 Texas Business & Commerce Code §15.05; and damages under pendant state claims including breach and/or interference with contracts and contractual relations and defamation.

The Fifth Circuit affirmed the trial court's summary judgment and its key holdings include the following:

- That the amendment of the Civil Rights Act of 1991, 42 U.S.C.A. §1981 did not authorize a suit for damages against municipalities or their officers for racial discrimination in the making and enforcement of contracts on the basis of race or ethnic origin;

- That a physician with a property interest in his clinical and medical staff privileges at the public hospital was not entitled to any pre-suspension procedural due process since it was reasonable to consider him a danger even though he was not an imminent danger and there was no evidence it was impractical to provide pre-suspension procedural due process;

- That Petitioner presented no evidence to support his claim of discrimination on the basis of race or ethnic origin in spite of the fact that an independent witness testified that one of his chief antagonist's, the Respondent Miller, had previously publicly referred to him at the hospital as a "sand nigger" and "camel jockey" later ghost wrote a report under the section chief's name which contained significant case fabrications which was a dominant cause of the suspension. Citing its "casual remarks" line of cases the court held these remarks were either too remote or not made in the course of the suspension by the decision maker and were therefore not relevant to prove racial discrimination.

- That the Local Units of Government Act, 15 U.S.C.A. §§34-36 and its Texas counterpart 4 Tex. Bus. & Com. Code §15.05(g) provide absolute immunity to public hospitals and its officials for damage claims under the anti-trust laws;

- That Respondents are immune from all of Petitioners' causes of action since it was reasonable to consider Dr. Patel a danger; and

- The courts declined to rule on Petitioners' challenge to the constitutionality of the Health Care Quality Improvement Act, 42 U.S.C.A. §§11111, et seq. and its Texas counterpart §160.010(1), Texas Occupational Code (V.T.C.S.) and §161.033, Texas Health & Safety Code Ann. (V.T.C.S.)

Petitioners timely petitioned for rehearing which was denied on August 6, 2002.

## REASONS FOR GRANTING THE WRIT

### I. The Decision of the Fifth Circuit Court of Appeals Conflicts With Decisions of Other Circuits and/or is Incorrect.

#### A. The Civil Rights Act of 1991, 42 U.S.C.A. §1981.

In a plurality opinion construing a pre-1991 version of the Civil Rights Act, *Jett v. DISD*, 491 U.S. 701, 109 S.Ct. 2702 (1989), this Court held that the former version of §1981 provided no cause of action against state actors. When Congress amended the statute in 1991 it included a provision in §1981(c) that the rights therein "are protected against impairment by non-governmental discrimination and impairment under color of state law", however, the Fifth Circuit in its opinion below and in *Oden v. Oktibbeha County*, 246 F.3d 458, 463 (5th Cir. 2001) held that *Jett* continued to be viable and that the amendment to the Civil Rights Act of

1991 did not authorize damage suits against municipalities or its officers for civil rights violations. The Fourth Circuit in *Dennis v. County of Fairfax*, 55 F.3d 155, 156 n. 1 (4th Cir. 1995) and the Eleventh Circuit, *Butts v. County of Volucia*, 222 F.3d 891, 894 (11th Cir. 2000) agree with the lower court, however, the Ninth Circuit disagrees. *See*, *Municipalities Federation of African American Contractors v. Oakland*, 96 F.3d 1204 (9th Cir. 1996) which held that the amendment to the language in 42 U.S.C.A. §1981(c) evinces an intent on the part of Congress to authorize civil rights actions for damages against municipalities and its officers. *Accord*, *Everett-Dicko v. Ogden Entertainment Services*, ____ F.3d ____*2002 U.S. App. Lexis 8602 (9th Cir. 2002). Petitioner urges the Court to overrule *Jett* and affirm the Ninth Circuit view.

Relying upon its "casual remarks" line of cases the court held that racist remarks by the Respondent Miller who ghost wrote an adverse report for the section chief which falsely stated it was a report on behalf of the Cardiovascular Committee; which was published to the hospital officials who suspended Dr. Patel; and contained case fabrications and played a dominant role in Dr. Patel's suspension constituted no proof to support a claim of discrimination.

The "casual remarks" doctrine stems from a series of employment discrimination cases. It is a four part rule applied in a rigid manner to determine whether or not discriminatory remarks are admissible to prove discrimination. The Fifth Circuit held that the remarks must not be vague but must be clear and unequivocal, they must be made by an official with authority, they must be made in the course and/or context of the termination and they must cause or result in the termination. In the instant case, although acknowledging that the remarks were racist the court held that

they were too remote, were not made by the decision maker or cause the suspension and were therefore irrelevant to prove discrimination. This holding is contrary to *Reeves v. Anderson Plumbing Products, Inc.*, 430 U.S. 133 (U.S. 2000) where this Court reversed the Fifth Circuit and held that the discriminatory remarks about the plaintiff's age were the precise type of proof necessary to prove a case of discrimination. The mechanistic "casual remarks" line rule shuts the door to a jury ever hearing evidence of racist remarks unless they are made during the act of termination. This rule incomprehensively assumes that an official with a racist agenda will be dumb enough to make such remarks in the course of termination and insulates off record racist comments. The "casual remarks" rule would arguably allow an official to treat the terminated person with respect on the record during termination procedures, and then be free to make offensive racist jokes about the person during a restroom break since "off the record" racist statements are not in the course of termination and inadmissible to prove discrimination. The "casual remarks" line of cases is wrong, it is inconsistent with *Reeves v. Anderson Plumbing Products, Inc.* and the intent of Congress to liberally construe 42 U.S.C.A. §1991 to eliminate vestiges of slavery. The court erred in holding that Dr. Patel presented no evidence of racial discrimination. Dr. Miller's ghost report, which contained case fabrications, was a significant cause of the suspension, which was later unanimously ruled to be improper. Moreover, the decision conflicts with its own precedents, since it has held in at least two cases that racist remarks by a non-decision maker whose investigation or work was relied upon by the officials, that this can be relevant to prove discrimination. *See, Haas v. Advo Systems*, 168 F.3d 732, 733-734 (5th Cir. 1999); *Long v. Eastfield College*, 88 F3d 300 (5th Cir. 1996).

B. 42 U.S.C.A. §1983. The Due Process Claim.

Although it was undisputed Dr. Patel had a protected property interest in his clinical and medical staff privileges at the public hospital the lower court held since it was reasonable to consider him a danger he was not entitled to receive any pre-suspension procedural due process even though he was not an imminent danger and there was no evidence it was impractical to provide informal due process. Petitioner contends that whether or not it was reasonable to consider him a danger should be a fact question for the jury, since the hospital officials knew that he had been a member of the staff for seventeen years; that he had no significant malpractice history; that he had the lowest complication rate of any of the interventionalists on the staff even though he was the highest volume interventionalist at the hospital having performed thousands of procedures; that his overall morbidity and mortality rate over a two year period was far less than the 4% threshold which is set by the American College of Cardiology for consideration of removal of the interventionalist privileges; that the majority of the cases criticized by the internal and external reviewers had been approved by the Cardiovascular Committee for acceptable morbidity and mortality; that none of the adverse reports called for summary suspension and the cases were old having been managed many months prior to the suspension. The lower court held notwithstanding this evidence the hospital was entitled to summary judgment since he was not even entitled to pre-suspension due process it was reasonable to consider him a danger without regard to whether he was an imminent danger or it was impractical to provide pre-suspension due process. This holding conflicts with *Gilbert v. Homar*, 520 U.S. 924 (1997) which held that post-deprivation due process may be sufficient where the state must act quickly or it would be impractical to provide pre-

deprivation due process. The record established that the two internal reports and the external report was based on cases that were managed many months prior to the suspension; that the hospital officials had copies of the two internal reports months before the January, 1999 suspension and had not concluded they justified summary suspension; and the external reviewer's report was received six days before the summary suspension and did not call for suspension. If he was an imminent danger, why wasn't he suspended when the first report was issued in June, 1998 or when the second report was issued in early November, 1998? The hospital presented no proof he was an imminent danger, or that it was impractical to provide procedural due process. There was no reason Dr. Patel could not have been given the three reports and a few hours to respond in the six days between January 13, when they received Dr. Lange's report and January 19, the date of the suspension, before he was suspended. The hearing panel unanimously restored his privileges. Therefore, not only was there a fact question as to whether he was an imminent danger, there was no evidence that it was impractical to provide pre-suspension due process as required by *Gilbert v. Homar*. The lower court's decision conflicts with its own en banc decision of *Caine v. Hardy*, 943 F.2d 1406 (5th Cir. 1991) where the anesthesiologist was considered to be a danger but the court held that the due process requirements were satisfied by a pre-suspension investigation carried out by a duly appointed Ad Hoc Committee under the bylaws which was unbiased, and the physician also had the right to participate and did participate in numerous informal conferences with notice of the charges and an opportunity to respond prior to the suspension. *See also, Wells v. DISD*, 693 F.2d 679 (5th Cir. 1986) (held school district liable for damages for failing to provide pre-termination procedural due process).

C. Anti-Trust Claims.

The court held that Petitioners presented no evidence of anti-trust injury, or alternatively that Respondents were absolutely immune from anti-trust damages.

Although the court accepted Petitioners' definition of the product line services to include cardiovascular invasive and interventional services and Petitioners' definition of the relevant market to be Midland Memorial Hospital, the court held that because Petitioners were only temporarily removed from the relevant market they had established no anti-trust injury. Dr. Patel alleged that he was the dominant supplier of over 50% of all the cardiovascular invasive and interventional services at Midland Memorial Hospital, and that he was illegally removed from the hospital by racist and fabricated reports from his competitors for nearly a year. He had been performing over 350 interventions per year, and during his suspension his practice was virtually taken over by others, including his competitors at Permian Cardiology who were the second most dominant supplier (30-35%) and who also provided the fabricated internal reviews. He alleged that his planned independent heart hospital had to be delayed three years because of the suspensions. He alleged that there was injury to consumers because he could provide the services more cheaply. These are the precise type of anti-trust injuries the anti-trust laws are designed to protect. *See, Brunswick Corp. v. Pueblo Bowlomatic, Inc.*, 429 U.S. 477, 489, n. 14 (1977).

Alternatively the Fifth Circuit erred in holding that Respondents were absolutely immune from anti-trust damages based upon 15 U.S.C.A. §§34-36 (2000) and 4 Tex. Bus. & Com. Code §15.05(g) (V.T.C.S.) which provides:

> "No damages, interest on damages, costs or attorney's fees may be recovered [for violation of anti-trust laws] in any claim against any person based on any official action directed by a local government, or official or employee thereof acting in an official capacity."

The question is whether a hospital is entitled to absolute immunity for anti-trust damages, regardless of what it does, or if it is only entitled to immunity if its actions could be construed as official action directed by a local government in "official" capacity. The Fifth Circuit had previously ruled that public hospitals are not entitled to absolute immunity from anti-trust damage claims in *Care Center v. Hospital Services District*, 171 F.3d 231 (5th Cir. 1999) cert. denied 120 S.Ct. 398. There a Louisiana statute authorized a public hospital district to form joint ventures and conduct closed door meetings which was construed not to afford the hospital district immunity to displace competition by entering into non-competitive agreements with managed care companies. *Accord, Community Hospital v. Antelope Valley Hospital District*, 940 F.2d 397 (9th Cir. 1991). These cases support the notion that the anti-trust immunity should not be absolute but qualified, and this should depend on whether or not the conduct is official action directed by the local government in an official capacity. The Fourth and Eleventh Circuit appear to align themselves with the lower court's holding that hospitals should be absolutely immune from anti-trust damage suits. *See, Coastal Neuropsychiatric Assoc. v. Onslow Memorial Hospital, Inc.*, 795 F.2d 340 (4th Cir. 1986); *Bolt v. Halifax Hospital Medical Center*, 980 F.2d 1381 (11th Cir. 1993); *FTC v. Hospital Board of Directors*, 38 F.3d 1184 (11th Cir. 1994).

These statutes also violate Petitioner's constitutional right of access to the courts. (See arguments under Paragraph E, *infra*).

D. Erroneous Summary Judgment Standard of Review.

Although the court stated that it was required to adopt the non-movant's version of the evidence, nevertheless it adopted the movant's version of the evidence in granting summary judgment, which practice by the Fifth Circuit was reversed in *Reeves v. Anderson Plumbing Products, Inc.*, 430 U.S. 133 (U.S. 2000). The non-movant in the instant case presented significant summary judgment evidence that hospital officials knew Dr. Patel was not an imminent danger, including the fact that the hospital officials knew that he had been a member of the medical staff for seventeen years without significant medical malpractice history; that he was the highest volume operator performing over 350 interventions a year or thousands of interventions over the course of his career at the hospital yet he had the lowest complication rate of interventionalists on the staff; that his complication rate was far below the 4% threshold set by the American College of Cardiology for removal of an interventionalist's privileges; that the Cardiovascular Committee had previously approved the majority of the cases criticized by the internal and external reviewers; and though the reports raised concerns none of the reports called for summary suspension or stated he was an imminent danger. In a subsequent hearing the administrative panel ruled 5 to 0 that he was not a danger and should have his privileges restored. Nevertheless, the court held, by adopting the movant's version of the evidence, that it was reasonable to consider him a danger and dismissed the case. This is contrary to the appropriate standard of review in a summary judgment case

as set forth in *Reeves v. Anderson Plumbing Products, Inc., supra*.

E. Refusal to Rule upon Petitioners' Constitutional Challenge to the State and Federal Health Care Quality Improvement Acts.

Dr. Patel's anti-trust claims and pendant state claims for defamation, breach of contract, interference with contractual relations were dismissed because the action arose out of peer review and it was reasonable to consider Dr. Patel a danger. Texas law supported the pendant claims including suits for damages by a physician for interference with existing and prospective patients, *Gillum v. Republic Health Care Corp.*, 778 S.W.2d 558, 565 (Tex.App. - Dallas 1989); as well as a suit for defamation arising out of false publication of charges that he is incompetent and dangerous, *Roe v. Walls Regional Hosp.*, 21 S.W.3d 647 (Tex.App. - Waco 2000) and claim for breach of contract for denying rights protected under the bylaws. *Walls Regional Hospital v. Altares*, 903 S.W.2d 36 (Tex.App. - Waco 1994, no writ). Because it was reasonable to consider Dr. Patel a danger the court held this trumped all of these causes of action as well as the anti-trust causes of action.

The lower courts refused to rule upon Petitioner's challenge to the constitutionality of these statutes. Petitioner alleged in his Original and Amended Complaint as well as his Reply Brief on appeal that the state and federal versions of the Health Care Quality Improvement Act which provide absolute immunity from lawsuits arising out of peer review were unconstitutional for three reasons: first, because Congress exceeded its authority to regulate interstate commerce under the Commerce Clause of the United States Constitution;

second, by providing absolute immunity from traditional common law lawsuits these acts abrogated Petitioner's right of access to the open courts which is protected not only by the equal protection, due process and due course of law provisions of the Texas constitution, but also the equal protection and due process clauses of the United States Constitution; and third, by singling out physicians for denial of their common law rights to pursue causes of action and not all licensed professionals, Petitioner was denied equal protection.

1. Commerce Clause.

In *United States v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624 (1995) and *United States v. Morrison*, 529 U.S. 598 120 S.Ct. 1740 (2000), this Court struck down federal laws prohibiting the bringing of fire arms within school zones and providing a federal remedy for rape victims since Congress exceeded its authority under the Commerce Clause to act as the regulation of schools and providing remedies for rape victims was a matter for local governments and does not substantially affect interstate commerce. Similarly, hospital credentialing of physicians has historically not been a function of the federal government but rather is done by local hospitals and state boards of medical examiners and does not substantially affect interstate commerce. In the preamble to the Health Care Quality Improvement Act is an anecdotal comment that the connection with interstate commerce is the fact that physicians may move from state to state to establish new practices and conceal past problems, however, this does not demonstrate a substantial impact upon interstate commerce sufficient for Congress to regulate peer review at local hospitals and erroneously assumes state board of medical examiners are not competent to deal with problem doctors who may move from one state to another. Congress stated in

the Act's preamble the real reason for its passage of the Health Care Quality Improvement Act was that hospital officials had been successfully sued in an anti-trust case and therefore the purpose of the Act was to afford immunity from anti-trust suits. Affording immunity to anti-trust violators is not a compelling state interest. Under *U. S. v. Morrison* and *U.S. v. Lopez* Congress exceeded its powers under the Commerce Clause.

2. The Open Courts.

Right of access to the courts was guaranteed in the Magna Charta. 16 C.J.S. "Constitutional Law" §1428, p. 678 n. 74. Most state constitutions, including Texas contain provisions protecting this right. *Id.* at n. 75. *LeBohm v. City of Galveston*, 275 S.W.2d 951 (Tex.). Right of access to the courts is considered a fundamental constitutional right. *Thistlethwaite v. City of New York*, 362 F.Supp. 88 aff'd 497 F.2d 339 cert. denied 419 U.S. 1093, 95 S.Ct. 686. The right of access to the courts has frequently been applied to protect prisoners' rights to challenge convictions on constitutional grounds, *Bounds v. Smith*, 430 U.S. 817, 97 S.Ct. 1491 (U.S.), however, the constitutional guarantee also applies to provide open courts to assure a remedy for injuries to person and property and has been characterized as one of the most sacred and essential of all constitutional guarantees. 16 C.J.S. "Constitutional Law" §1429 n. 93. The right of access to open courts gives every litigant his day in court and a full and ample opportunity to be heard. *supra* at 1429 n. 98. It is designed to protect against arbitrary action. *supra* at n. 99. Historically, even an administrative action required some right of judicial review. *supra* at n. 11. The abolition of a common law cause of action by a statutory grant of immunity has been held to violate the constitutional right of access to open courts. *Id.* at nn. 30-31, §1429 nn. 61-62, 67.

*See*, e.g. *Noel v. Menninger Foundation*, 267 P.2d 934 (Kan.) (statute exempting charitable organization from being liable for its torts); *State v. Berry*, 175 N.E. 855 (Ohio) (rule prohibiting policeman from suing on penalty of dismissal); *Oien v. City of Sioux Falls*, 393 N.W.2d 286 (S.D.) (law expanding sovereign immunity to municipalities to include what had previously been non-governmental or discretionary functions); *Hardy v. Meulen*, 512 N.E.2d 626 (Ohio) cert. denied 108 S.Ct. 1029 (statutes of limitations which prohibit bringing undiscoverable medical malpractice cause of action after the time period has run); *accord, Nelson v. Krusen*, 678 S.W.2d 918 (Tex. 1984); *Sax v. Votteler*, 648 S.W.2d 661 (Tex. 1983). The United States Supreme Court recognizes this constitutional right. *Griffin v. Illinois*, 351 U.S. 12 (1956).

Petitioner's pendant claims were recognized at common law. A cause of action for damages caused by defamation was a recognized cause of action under the Texas common law which was later codified in the Texas statute. *See, Renfro Drug Co. v. Lawson*, 160 S.W.2d 246 (Tex.Comm. on Appeal 1942); Texas Civil Practices & Remedies Code §73.001 (V.T.C.S.) 50 Tex.Jur.3d, Libel & Slander, §4 nn. 16-17. Texas common law also recognized causes of action for intentional interference with contractual relations, *Gillum v. Republic Health Corp.*, 778 S.W.2d 558, 565 (Tex.Civ.App. - Dallas 1989) and the common law recognized a right to sue for breach of contract. *Flanders v. Wood*, 18 S.W. 572 (Tex.). Although an anti-trust claim is a statutory remedy, and arguably limits can be placed upon a statutory remedy, the anti-trust statutes were a codification and enlargement of common law causes of action against monopolies and restraint of trade upon unfair competition. *See*, 51 Tex.Jur.3d, Monopolies and Restraints §4, p. 542 n. 26. The state and federal versions of the Health Care Quality

Improvement Act provide no jurisdictional review of a peer review hearing and provide absolute immunity from all damage claims arising out of peer review provided there is compliance with the four fairness requirements. *Roe v. Walls Regional Hospital*, 21 S.W.3d 646 (Tex.App. - Waco 2000). Under these circumstances all physicians common law and statutory causes of actions for damages are eliminated. He has no right to present any evidence on such damage claims in Court. These statutes violate Petitioners' constitutional right of access to the courts.

3. Equal Protection.

No other licensed professional (and not every person working in health care) is targeted for the elimination of all their rights to assert common law damage causes of action. If an attorney, accountant, engineer, teacher or architect suffers substantial damages to their career, reputation and business by fabricated reports of incompetence, there are no laws eliminating their rights to sue for defamation or interference with business relationships or breach of contract. These laws abrogate a physician's common law causes of action and not other licensed professionals which denies equal protection. *See, City of Cleburne, Texas v. Cleburne Living Center*, 437 U.S. 432, 105 S.Ct. 3249.

## CONCLUSION

Petitioners pray that this Petition for Writ of Certiorari be granted and the Court enter an Order reversing the Judgments of the lower courts and remanding them for a jury trial on the basis of the grounds set forth herein, and for such other and further relief, general and special, at law or in equity to which Petitioners may be justly entitled.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER

## APPENDIX A

## UNITED STATES COURT OF APPEALS
## FOR THE FIFTH CIRCUIT

**No. 00-51265**
**[Filed August 6, 2002]**

P V PATEL, MD, individually; P V PATEL, MD, A Professional Association; THE HEART CENTER; ECHO LAB INCORPORATED; ASSOCIATES OF MIDLAND CARDIOVASCULAR AND INTERNAL MEDICINE, A Professional Association, also known as Midland Cardiovascul,
Plaintiffs - Appellants-Cross-Appellees

v.

MIDLAND MEMORIAL HOSPITAL AND MEDICAL CENTER; ET AL,
Defendants;

MIDLAND MEMORIAL HOSPITAL AND MEDICAL CENTER; MEMORIAL HEART AND VASCULAR INSTITUTE; PERMIAN CARDIOLOGY GROUP; STEPHEN BROWN, MD; MICHAEL MILLER, MD; JAY MENDEZ, MD; DONALD LOVEMAN, MD; HAROLD RUBIN,
Defendants - Appellees-Cross-Appellants.

Appeals from the United States District Court
for the Western District of Texas, Midland.
*Patel v. Midland Mem. Hosp. & Med. Ctr.*,
2002 U.S. App. LEXIS 13834
(5th Cir. Tex. 2002)

**JUDGES:**
Before JONES, EMILIO M. GARZA and STEWART, Circuit Judges.

**OPINIONBY:**
Emilio M. Garza

**OPINION**
**ON PETITION FOR REHEARING**

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

/s/_____
Emilio M. Garza
United States Circuit Judge

## APPENDIX B

## UNITED STATES COURT OF APPEALS
## FOR THE FIFTH CIRCUIT

**No. 00-51265**
**[Filed July 10, 2002]**

P V PATEL, MD, individually; P V PATEL, MD, A Professional Association; THE HEART CENTER; ECHO LAB INCORPORATED; ASSOCIATES OF MIDLAND CARDIOVASCULAR AND INTERNAL MEDICINE, A Professional Association, also known as Midland Cardiovascul,
Plaintiffs - Appellants-Cross-Appellees,

v.

MIDLAND MEMORIAL HOSPITAL AND MEDICAL CENTER; ET AL,
Defendants;

MIDLAND MEMORIAL HOSPITAL AND MEDICAL CENTER; MEMORIAL HEART AND VASCULAR INSTITUTE; PERMIAN CARDIOLOGY GROUP; STEPHEN BROWN, MD; MICHAEL MILLER, MD; JAY MENDEZ, MD; DONALD LOVEMAN, MD; HAROLD RUBIN,
Defendants - Appellees-Cross-Appellants.

Appeals from the United States District Court
for the Western District of Texas

**JUDGES:**
Before JONES, EMILIO M. GARZA and STEWART, Circuit Judges.

## OPINION

EMILIO M. GARZA, Circuit Judge:

P.V. Patel, M.D., ("Dr. Patel") filed suit in district court against Midland Memorial Hospital and several of its doctors (collectively "the Defendants") for claims arising out of the hospital's summary suspension of all of his clinical privileges in January 1999.[1] Specifically, Dr. Patel alleged that the Defendants, by participating in the suspension of his privileges: (1) denied him pre-suspension due process in violation of 42 U.S.C. § 1983 (2000); (2) engaged in racial discrimination in violation of 42 U.S.C. § 1981 (2000); (3) engaged in an illegal monopoly and attempted to monopolize in violation of 15 U.S.C. §§ 1 & 2 (2000) and TEX. BUS. & COM. CODE ANN. § 15.05 (Vernon 2001); and (4) engaged in conduct that constituted breach of contract, defamation, and interference with contractual relationships. The district court granted the Defendants' motion for summary judgment on all of Dr. Patel's claims. Dr. Patel now appeals on the ground

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[1] Four associations in which Dr. Patel has an interest—P.V. Patel, M.D., Professional Association; The Heart Center; Associates of Midland Cardiovascular & Internal Medicine, Professional Association; and Echo Lab, Inc.—were also named plaintiffs in the suit.

that genuine issues of material fact exist with respect to all of his claims. The Defendants cross-appeal arguing that under the Health Care Quality Improvement Act of 1986 (HCQIA), 42 U.S.C. §§ 11101-11152 (2000), they are immune from all of Dr. Patel's claims, except for his civil rights claims, and are entitled to reasonable attorneys' fees.

## I

Dr. Patel is a board-certified cardiologist who specializes in invasive and interventional cardiology.[2] He joined the staff of Midland Memorial Hospital ("Midland"), a public hospital, in 1982. While at Midland, he continuously expanded his practice by obtaining new clinical privileges and increasing the volume of procedures he performed. By the mid-1990s, he performed one of the highest numbers of cardiac interventions of the hospital staff. Dr. Patel also expanded his practice outside of Midland by maintaining a practice at Odessa Medical Center and opening his own cardiac cath labs and primary care clinics, at times competing with Midland and members of its staff. For fifteen years, Dr. Patel appears to have practiced successfully without any significant problems.

Two incidents in 1997 and 1998, however, drew the attention of Midland's Medical Executive Committee (MEC) to Dr. Patel's practice. In November 1997, the MEC

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[2] Invasive cardiology includes angiograms or studies on the coronary arteries in a cardiac catheterization laboratory. Interventional cardiology includes procedures on coronary arteries in a cardiac cath lab, including the placement of a balloon or angioplasty, the placement of stents, and rotablater therapy.

investigated an altercation between Dr. Patel and a nurse in front of a patient just before a procedure. Questions were raised as to whether Dr. Patel properly secured the patient's consent to continue with the procedure and whether he waited for a new nurse to arrive before beginning the procedure. The MEC ultimately suspended Dr. Patel's clinical privileges for fourteen days and ordered him to undergo a behavioral evaluation.

Six months later, the MEC received its second complaint regarding Dr. Patel's practice. The chairman of Midland's Department of Radiology reported to the MEC that Dr. Patel had "an inordinate number of catastrophic outcomes" among his recent cases of noncardiac peripheral vascular interventions. The MEC directed an ad hoc committee of eight cardiology, vascular surgery, and radiology physicians to review Dr. Patel's problematic cases. After reviewing three cases handled by Dr. Patel in the preceding eight months, the committee reported several concerns to the MEC. Specifically, the committee cited concerns regarding Dr. Patel's technical performance of procedures, his intra-procedure decisionmaking, and the accuracy of his documentation. The MEC then met to discuss the cases and the committee's report, and voted unanimously to revoke Dr. Patel's noncardiac peripheral privileges. While a post-suspension hearing was pending, the MEC sought independent review of three of Dr. Patel's cases by two outside experts. Both confirmed that the revocation was appropriate.[3]

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[3] The MEC sent records from Dr. Patel's cases to Richard L. Vogelzang, M.D., Professor of Radiology and Chief of Vascular

At the same meeting during which it revoked Dr. Patel's peripheral privileges, the MEC charged the Cardiovascular Committee with reviewing Dr. Patel's diagnostic and interventional cardiac procedures "to ensure that a similar pattern is not emerging." In response, Stephen Brown, M.D., Chair of the Cardiology Committee, reviewed the last six fatalities in cases handled by Dr. Patel. In a report made to John Foster, Jr., M.D., Chairman of the MEC,[4] Dr. Brown noted several concerns with each of the cases and concluded that Dr. Patel's management of them warranted further investigation. He recommended sending the cases for outside review to avoid any issues of bias on the

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and Interventional Radiology at Northwestern Memorial Hospital in Chicago, Illinois, and Frank J. Rivera, M.D., Department of Radiology Imaging at Baylor University Medical Center in Dallas, Texas. Dr. Vogelzang stated in his report that Dr. Patel "lacks basic technical skill in the performance of [peripheral interventions]," "lacks understanding of the clinical management of peripheral vascular disease," and "has had an unusually and unacceptably high rate of major complications and catastrophic outcomes." Dr. Vogelzang also noted "significant and marked discrepancies" in Dr. Patel's recordkeeping, including a report that a patient had "returned to his home in an improved condition," when in fact he had died. Dr. Rivera similarly criticized Dr. Patel's basic knowledge, skills, and judgment in performing peripheral interventions. With respect to Dr. Patel's record keeping, Dr. Rivera reported: "Because of the severity of the discrepancies, one cannot help but be concerned that these are not simple errors, but in fact a blatant attempt to give false information."

[4] Although initially named as a defendant, Dr. Foster has since been dismissed from this case.

part of Dr. Patel's competitors. As a result, Dr. Foster sent ten of Dr. Patel's cardiology cases to Richard A. Lange, M.D., Director of the Cardiac Catheterization Laboratory at the University of Texas Southwestern Medical Center at Dallas, for outside review.

While Dr. Lange conducted his outside review, the Cardiovascular Committee continued its inside review. At its bi-monthly meeting to review the morbidity/mortality cases of cardiologists at the hospital, the Committee reviewed Dr. Patel's recent morbidity/mortality cases and noted a "high concentration of severe complications."[5] The Committee then forwarded a report to Dr. Foster stating that Dr. Patel was "not operating in a safe fashion" while performing certain coronary procedures and that the situation was "very dangerous."[6] The report again recommended outside review by an unbiased third party, and potentially a reevaluation of Dr. Patel's privileges depending on the outcome of that report.

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[5] Although the Committee included thirteen members at the time of the meeting, the only three doctors in attendance were Dr. Brown, Dr. Miller, and Dr. Barnett, all members of the Permian Cardiology Group and competitors of Dr. Patel's. Dr. Barnett was initially named a defendant in this case, but has since been voluntarily dismissed.

[6] The Committee's report was written by Dr. Miller, but was submitted to the MEC under Dr. Brown's name.

Dr. Foster then requested that the Medical Control Committee (MCC)[7] review the Cardiovascular Committee reports regarding Dr. Patel's cardiology cases. The MCC met to discuss the cases, but decided to wait for the results of Dr. Lange's review, which were expected within the week, before acting. One week later, Dr. Lange reported to Dr. Foster that six of the ten patients whose cases he reviewed died as a "direct result of an interventional procedure" that was performed by Dr. Patel: (a) without clear indication, (b) with poor technical skills, or (c) in coronary vessels poorly suited for the procedure. Dr. Lange also found problems in the cases that suggested poor medical judgment. Two days later, the MCC reviewed Dr. Lange's report and voted to recommend the suspension of all of Dr. Patel's privileges. Upon the MCC's request, the MEC met to consider the evidence and the recommendation for suspension. After deliberation, the MEC unanimously approved the MCC's recommendation that Dr. Patel's privileges be summarily suspended.[8]

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[7] The MCC consists of the chiefs of each section in the Department of Medical Services and other members of the Department of Medicine appointed by the department chairman.

[8] Only two of the defendants in this case participated in this vote—J.E. Mendez, M.D., Midland's Chief of Staff and Chairman of the MEC, and Donald Loveman, M.D., Chairman of the MCC. Two other defendants attended the meeting, but could not participate in the vote—Harold Rubin, Pharm. D., Midland's President and CEO since 1991 and a non-voting member of the MEC, and Dr. Brown.

Dr. Patel was notified of his suspension by letter. The MEC then informed him that he had a right to a post-suspension hearing under Midland's Fair Hearing Plan. Dr. Patel immediately requested a full due process hearing and the hospital offered to provide one two weeks later. Thereafter, an Ad Hoc Hearing Committee ("Hearing Committee") held ten meetings in which Dr. Patel and the hospital submitted documentary evidence and testified regarding the events leading up to the suspension and the hospital's continued concerns about the quality of Dr. Patel's practice. After hearing testimony from eight physicians and reviewing over 125 exhibits, the Hearing Committee ultimately concluded that Dr. Patel was not a danger to his patients. Instead, the Hearing Committee faulted Dr. Patel's inadequate documentation—including his failure to note on patients' records major complications that occurred during procedures—for the questionable appearance of his cases. As a result, the Hearing Committee recommended that Dr. Patel's clinical privileges be restored, but that he be placed on probation for six months to ensure that he prepare timely and accurate medical records for each of his patients at Midland. Although the Hearing Committee recommended restoration of his privileges, it also held that there were "reasonable grounds" for the action taken by the various doctors and hospital committees reviewing Dr. Patel's cases prior to the suspension. In addition, the Hearing Committee held that the participating doctors acted "in reasonable belief that such action was in furtherance of quality health care," and "in reasonable belief that [action] was warranted by the facts known after a reasonable effort to obtain the facts." Finally, the Hearing Committee held that Dr. Brown, Dr. Miller, and Dr. Lange—the authors of three of the reports reviewing Dr. Patel's cases—"acted at all times without malice, without

fraudulent or wrongful intent, and without any ulterior or improper motive."[9]

After his privileges were restored, Dr. Patel filed suit against Midland, four of the eleven members of the MEC who voted to suspend him, the three cardiologists reviewing his cases on behalf of the Cardiovascular Committee, the Permian Cardiology Group, and Memorial Heart and Vascular Institute.[10] Specifically, Dr. Patel alleged that, by contributing to his suspension, the Defendants: (1) denied him pre-suspension due process in violation of 42 U.S.C. § 1983; (2) engaged in racial discrimination in violation of 42 U.S.C.

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[9] The Hearing Committee did not review the MEC's 1998 suspension of Dr. Patel's peripheral privileges, which were still suspended at the time oral argument was heard on this case.

[10] Dr. Patel named the following Midland doctors as defendants: 1) Dr. Foster, Chairman of the MEC in 1998; 2) Dr. Rubin, Midland's President and CEO since 1991, and a non-voting member of the MEC; 3) Dr. Loveman, Chairman of the MCC; 4) Dr. Mendez, Midland's Chief of Staff and Chairman of the MEC in 1999; 5) Dr. Brown, Chairman of Midland's Cardiovascular Committee; 6) Dr. Miller, a member of the Cardiovascular Committee; and 7) Dr. Barnett, a member of the Cardiovascular Committee. Dr. Patel later voluntarily dismissed Drs. Foster and Barnett as defendants in this case. In addition to Midland and the individual doctors, Dr. Patel named Memorial Heart and Vascular Institute ("Memorial Heart") and the Permian Cardiology Group as defendants. Memorial Heart operated a cardiac catheterization laboratory in Midland between March 1998 and December 1999. The Permian Cardiology Group, of which Drs. Brown, Miller, and Barnett are members, competes with Dr. Patel at Midland for cardiology services.

§ 1981; (3) engaged in an illegal monopoly and attempted to monopolize in violation of 15 U.S.C. §§ 1 & 2 and TEX. BUS. & COM. CODE ANN. § 15.05; and (4) engaged in conduct that constituted breach of contract, defamation, and interference with contractual relationships. The district court dismissed all of Dr. Patel's claims on summary judgment, but failed to reach the Defendants' claim for immunity and attorneys' fees under HCQIA. Both sides now appeal.

## II

We review a district court's grant of summary judgment de novo. *Grenier v. Med. Eng'g Corp.*, 243 F.3d 200, 203 (5th Cir. 2001). Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). On a motion for summary judgment, a court must review the facts in the light most favorable to the non-movant. *Walker v. Thompson*, 214 F.3d 615, 624 (5th Cir. 2000).

On appeal, Dr. Patel contends that he has presented sufficient evidence to create genuine issues of material of fact with respect to all of his claims. After reviewing the evidence in the record and the relevant law, we disagree. We address each claim separately below.

## III

Dr. Patel first contends that the district court erred in granting summary judgment in favor of the Defendants on his procedural due process claim.[11] Specifically, he argues that, as a matter of law, due process required that he receive notice and some opportunity to be heard on the allegations against him before his clinical privileges could be suspended.[12] Because Midland and the doctors deprived him of such process prior to his January 1999 suspension, he argues that he is entitled to relief under 42 U.S.C. § 1983.[13]

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[11] It is undisputed that Dr. Patel had a protected property interest in his clinical privileges at Midland Memorial Hospital, a political subdivision of the State of Texas. As a result, Dr. Patel could not constitutionally be deprived of those privileges without due process of law. We assume without deciding that Dr. Patel's January 1999 suspension is a deprivation to which the protections of due process apply. *See Gilbert v. Homar*, 520 U.S. 924 (1997) (assuming without deciding that a suspension infringes on a protected property interest).

[12] To be sure, Dr. Patel only challenges as inadequate his *pre*-suspension process. He concedes that his *post*-suspension hearing comported with the requirements of due process. He also does not challenge the process afforded him, both before and after, his 1997 and 1998 suspensions.

[13] Section 1983 creates a cause of action against any person who, under color of law, "subjects, or causes to be subjected," a person "to the deprivation of [a constitutional right]." 42 U.S.C. § 1983.

Dr. Patel is correct that due process generally requires notice and an opportunity to be heard prior to the deprivation of a protected property interest. *See, e.g., Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985). It is well settled, however, that "[p]rocedural due process is a flexible concept whose contours are shaped by the nature of the individual's and the state interests in a particular deprivation." *Caine v. Hardy*, 943 F.2d 1406, 1412 (5th Cir. 1991) (en banc); *Gilbert*, 520 U.S. at 929. In some cases, "where a state must act quickly, or where it would be impractical to provide predeprivation process," postdeprivation process is enough to satisfy the requirements of due process. *Gilbert*, 520 U.S. at 930.

We have previously considered en banc the pre-suspension process due a physician where patient safety was considered to be at risk. In *Caine v. Hardy*, an anesthesiologist at a public hospital was suspended after an investigation of the death of one of his patients revealed serious deficiencies in his performance. *Caine*, 943 F.2d at 1407-08. Believing that Dr. Caine posed a danger to his patients, the hospital suspended him without first affording him a formal hearing. We held that, under such exigent circumstances, where the safety of the public is at risk, an adequate post-suspension remedy satisfies the requirements of due process. *Caine*, 943 F.2d at 1412.

In the case before us, the MEC had ample reason to believe that Dr. Patel's methods posed a danger to patient safety. As an initial matter, concern for Dr. Patel's cardiology interventions developed in connection with an investigation of deficiencies in his peripheral intervention practice and a suspension of those privileges. The MEC then

initiated an investigation of Dr. Patel's cardiology practice to protect against similar dangers. At the time the MEC voted to suspend Dr. Patel's privileges, it had before it a report from Dr. Brown asserting serious concerns with Dr. Patel's performance; a report from the Cardiovascular Committee finding a "high concentration of severe complications" in Dr. Patel's recent morbidity/mortality cases; an outside review from Dr. Lange concluding that six of the ten patients whose cases he reviewed died as a "direct result of an interventional procedure" performed by Dr. Patel; and the recommendation of the MCC, after independently reviewing the cases discussed in the Cardiovascular Committee's report, that Dr. Patel's privileges be suspended immediately. In light of the consistent findings before the MEC, the MEC reasonably concluded that it had no choice but to act quickly to protect patient safety.[14] Because pre-suspension process was not

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[14] In an effort to call into question the reason given for his suspension—patient safety—Dr. Patel attempts to discredit the individual reports relied upon by the MEC. Specifically, Dr. Patel challenges the credentials of his reviewers and questions the fact that each reviewer examined only a small percentage of his cases. Although Dr. Patel may be correct that a more thorough investigation would have shown him not to be a danger, this possibility does not affect the reasonableness of the MEC's investigation under the difficult circumstances of this case. As noted above, the MEC took several steps to substantiate its concerns prior to making its final decision to suspend. It sought several separate reviews of Dr. Patel's cases in order to obtain different perspectives before making its decision. It also specifically sought an additional review by a doctor outside the hospital, who was not in direct competition with Dr. Patel, to avoid any appearance of bias. The reviewers consistently found Dr. Patel to be an imminent danger and suggested that the consequences of

practical under these circumstances, Dr. Patel's due process rights were not violated.

Dr. Patel contends that *Caine* does not resolve the question of whether he received adequate pre-suspension process in this case for two reasons. First, he argues that the summary judgment record includes substantial evidence that he did not pose an "imminent danger" to patients at the time of his suspension. Specifically, he notes that he did not have a significant malpractice record, that his overall morbidity/mortality rate for cardiology intervention was the lowest at Midland in 1997 and 1998, and that five experts defended his technical skills and past performance at his post-suspension hearing. He also notes that the Hearing Committee unanimously recommended that his privileges be reinstated. At the very least, Dr. Patel contends, this evidence creates a genuine issue of material fact for summary judgment purposes.

Although we acknowledge the evidence presented by Dr. Patel that he was not *actually* dangerous at the time of his suspension, we believe Dr. Patel focuses on the wrong issue. When determining the amount of process constitutionally due Dr. Patel prior to the January 1999 suspension of his privileges, the key question is not whether Dr. Patel was *actually* a danger, but whether the MEC had reasonable grounds for suspending him as a danger. *Gilbert*, 520 U.S. at 933 (stating that the purpose of pre-suspension process,

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delaying action could be life-threatening. Under these circumstances, when time was of the essence, we believe the MEC reasonably relied on the evidence before it when suspending Dr. Patel.

assuming it is even required, is "to assure that there are reasonable grounds to support the suspension"). We have already determined that, based on the evidence before it, the MEC had such grounds. The fact that Dr. Patel was later able to produce evidence to rebut the reports before the MEC does not call into question the reasonableness of the MEC's conclusion at the time it voted to suspend him. As a result, Dr. Patel's attempt to create a fact issue with respect to whether he was actually dangerous fails.

Second, Dr. Patel argues that even if we find that he was a danger at the time of his suspension, *Caine* requires more pre-suspension process than he was actually afforded. Specifically, he notes that the physician in *Caine* had some notice of the investigation against him and that he was able to attend two informal meetings relating to the charges prior to his suspension. Dr. Patel contends that, according to the rule set forth in *Caine*, he was entitled to similar treatment before his suspension.

We disagree with Dr. Patel's reading of *Caine*. Although Dr. Patel is correct that the doctor in *Caine* happened to receive some notice of the charges against him prior to his suspension, *Caine* did not create a pre-suspension process requirement where patient safety is at risk. On the contrary, *Caine* makes clear that "[n]ot even an informal hearing . . . must precede a deprivation undertaken to protect the public safety." *Caine*, 943 F.2d at 1412.

Because, under the particular circumstances of this case, prompt action was necessary to secure patient safety, we conclude that Dr. Patel received all the pre-suspension process he was constitutionally due. As a result, the district

court properly granted summary judgment to the Defendants on this issue.[15]

## IV

In his second point on appeal, Dr. Patel argues that the district court erred when it granted summary judgment to the Defendants on his race discrimination claim. Specifically, Dr. Patel argues that genuine issues of material fact exist as to the real reason for his suspension. According to Dr. Patel, the Defendants did not suspend him because he was dangerous, but rather because he was Indian. As a result, he argues that he is entitled to relief under 42 U.S.C. §§ 1981 & 1983.[16]

The summary-judgment test for discrimination claims under § 1981 and § 1983 is the same as the test for discrimination claims under Title VII. *Pratt v. City of*

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[15]Because we conclude that Dr. Patel's due process rights were not violated, we do not address the individual defenses raised by Midland and the doctors to liability under § 1983.

[16]Since Dr. Patel filed his principal brief, we have held that § 1981 does not provide a remedial cause of action against local government entities and local government officials in their official capacities. *Oden v. Oktibbeha Cty.*, 246 F.3d 458, 463 (5th Cir. 2001). Recognizing that *Oden* forecloses his discrimination claim against at the very least, Midland, Dr. Patel asks in his reply brief for leave to seek a discrimination remedy under 42 U.S.C. § 1983. For purposes of this appeal, we will assume *arguendo* that he has proceeded under both sections.

*Houston*, 247 F.3d 601, 605 n.1 (5th Cir. 2001). To survive a summary judgment motion, the plaintiff must first present a prima facie case of discrimination. *See id.* at 606 n.2. If established, a prima facie case raises an inference of discrimination, and the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its adverse decision. *Id.* at 606. If the defendant presents such a reason, then the inference disappears, and the plaintiff must offer evidence that the proffered reason is a pretext for racial discrimination. *Id.*

Assuming *arguendo* that Dr. Patel has presented a prima facie case of discrimination, Midland and its doctors have proffered a legitimate, nondiscriminatory reason for his suspension. Specifically, they contend that his privileges were suspended because of concerns for patient safety. Thus, in order to survive summary judgment, Dr. Patel must proffer sufficient evidence of pretext to create a question of fact for the jury that race, rather than patient safety, was the real reason for his suspension. *Id.*

Dr. Patel first attempts to show pretext by presenting evidence of what he alleges is a pattern of discrimination against him by Midland and its doctors. According to Dr. Patel, his January 1999 suspension was only the latest example of the "aggressive and unfair competition" waged against him from the time he joined Midland. In the early 1980s, he notes an incident during which the hospital declined his offer to open a cardiac cath lab. According to Dr. Patel, the hospital's former CEO stated that "he would never do it with a foreign doctor." The hospital later opened a cath lab with a white doctor. Throughout the 1990s, Dr. Patel contends that Midland repeatedly took steps to expand its

operations to directly compete with, and impede the development of, his practice.[17]

These instances of competition do not create a question of fact regarding pretext in this case. As an initial matter, Dr. Patel fails to offer any evidence linking his 1999 suspension to these earlier events. More importantly, even if Dr. Patel could connect these events to his 1999 suspension, he still fails to create a question of fact for the jury that *race* motivated his suspension. *See Price v. Fed. Exp. Corp.*, 283 F.3d 715, 723-24 (5th Cir. 2002) (requiring evidence of pretext supporting "an inference that racial discrimination was the real reason for the employment decision"); *Pratt*, 247 F.3d at 606 ("After a [discrimination] case reaches the pretext stage, the question for summary judgment is whether a rational fact finder could find that the employer discriminated against the plaintiffs *on the basis of race*." (emphasis added)). With only one exception, Dr. Patel fails to present any

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[17] In his brief on appeal, Dr. Patel notes five examples of Midland's alleged competitive strategy against him: In 1990, the hospital bought the building where Dr. Patel operated an imaging center and "moved his business out and replaced it with its own imaging center." In 1992, after he opened a primary care clinic in Big Springs, Texas, the hospital opened its own primary care clinic there. In 1996, Dr. Patel opened a primary care clinic in Midland, Texas, and the hospital opened a clinic across the street. In 1997, the hospital signed a long-term lease for a building in Kermit, Texas that Dr. Patel was trying to buy for another clinic. Later that same year, after Dr. Patel opened another cath lab, the hospital formed a joint venture with Permian Cardiology Group and two other cardiologists to open a cath lab in direct competition with Dr. Patel's new lab.

evidence connecting any of Midland's competitive moves to racial animus. The only instance cited by Dr. Patel that might provide evidence of racial animus—where the former CEO of Midland declined to open a cath lab with a "foreign doctor"—took place more than a decade before his suspension. The former CEO who allegedly made the statement is not a party to this case and does not appear from the record to have had any involvement in Dr. Patel's 1999 suspension. Based on this evidence, no rational factfinder could conclude that Dr. Patel was suspended on account of his race.[18]

Dr. Patel also attempts to show pretext vis-à-vis three racist comments made by members of Midland's staff during

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[18] Dr. Patel also suggests that the inadequacy of the investigation into his practice evinces pretext. Specifically, he contends that, in light of the summary judgment evidence that he was not a danger at the time of his suspension, a rational factfinder could conclude that the investigation into his practice was a sham. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000) (stating that in some cases, a "trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose"). We disagree. Because we have already concluded that the MEC's decision to suspend was objectively reasonable based on the evidence before it, and that it had no reason to doubt the apparent quality of that evidence, the evidence of "falsity" here is not sufficient to create an inference that patient safety was merely a cover for discriminatory intent. *Id.* at 148 (noting that there will be "instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory").

the late 1990s. First, in either 1996 or 1997, Dr. Patel alleges that Dr. Miller referred to him twice as a "sand nigger" and stated that he was "probably parking his camel." Dr. Miller then scheduled one of his non-emergency patients ahead of one of Dr. Patel's patients for a procedure. Dr. Miller later wrote the Cardiovascular Committee's report criticizing Dr. Patel's handling of cases and describing him as "very dangerous." Second, in 1997 or 1998, Dr. Patel alleges that another person at Midland who was probably a cardiologist made the following statement: "[Dr. Patel] is nothing but a god damn Indian quack and I want him out of here. I want his ass out of here." Finally, soon after the second comment was made, an administrator allegedly stated, after hearing a complaint about the room conditions of one of Dr. Patel's patients, that "he didn't care about that."[19]

These statements also fail to create a fact issue regarding the reason for Dr. Patel's suspension. Specifically, Dr. Patel has not shown that these statements are more than "stray remarks." *See Wallace v. Methodist Hosp. Sys.*, 271 F.3d 212, 222-25 (5th Cir. 2001) (applying stray remarks

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[19] In its opinion, the district court noted that Dr. Patel alleged in his First Amended Complaint that Dr. Mendez made the following statement at the time of his suspension: "you foreign doctors are required to dot every *i* and cross every *t*, unlike nonforeign doctors." *See* Amended Order at 11. Dr. Patel does not mention this alleged statement in either of his briefs on appeal, or in any of his responses to the Defendants' summary judgment motion. Nor can we find any testimony supporting this allegation in any of the affidavits submitted by Dr. Patel. As a result, we must credit Dr. Mendez's undisputed affidavit denying that he made this comment.

doctrine where evidence of pretext was weak). We recently explained the stray remarks doctrine in *Rubinstein v. Adm'rs of the Tulane Educ. Fund*:

> [I]n order for comments in the workplace to provide sufficient evidence of discrimination, they must be "1) related [to the protected class of persons of which the plaintiff is a member]; 2) proximate in time to the [complained-of adverse employment decision]; 3) made by an individual with authority over the employment decision at issue; and 4) related to the employment decision at issue."

218 F.3d 392, 400-01 (5th Cir. 2000) (quoting *Brown v. CSC Logic, Inc.*, 82 F.3d 651, 655 (5th Cir.1996)). The comments cited by Dr. Patel fail to meet these criteria for several reasons.

First, we note that Dr. Miller's alleged statements were made two or more years before Dr. Patel was suspended. Although they are directed at Dr. Patel's Indian descent, they do not relate to any plans to investigate his practice or suspend his privileges. *See Brown*, 82 F.3d at 655-56 ("Comments that are vague and remote in time are insufficient to establish discrimination." (internal quotations and citations omitted)). Moreover, Dr. Miller had no authority over the decision to suspend Dr. Patel. *See Nichols v. Loral Vought Sys. Corp.*, 81 F.3d 38, 42 (5th Cir. 1996) ("To be probative, allegedly discriminatory statements must be made by the relevant decision maker."). Dr. Miller's role in Dr. Patel's suspension was limited to the report he drafted on behalf of Dr. Brown and the Cardiovascular Committee,

which recommended outside review of Dr. Patel's cases. Dr. Miller was not a member of the MEC—the body that voted to suspend Dr. Patel—nor was he a member of the MCC—the body that recommended suspension. Finally, the statements made by the unidentified speaker and the administrator cannot support an inference of discrimination. They do not appear to be related to Dr. Patel's suspension, nor can they be linked to an individual with authority over Dr. Patel's suspension.[20]

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[20] We note that, in addition to failing to establish pretext, Dr. Patel has failed to present sufficient evidence from which a rational factfinder could conclude that Midland had a custom or policy of racial discrimination. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978) (holding that a municipality can only be found liable under section 1983 where "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers"); *Gros v. City of Grand Prairie*, 181 F.3d 613, 615 (5th Cir. 1999) ("Liability arises only when the execution of an official policy or custom of the municipality causes the constitutional injury."). In his brief on appeal, Dr. Patel concedes that Midland has no policy of racial discrimination. He argues instead that the fact that Dr. Miller and other hospital staff felt free to make racially derogatory comments creates a fact issue as to whether the hospital had a custom of discrimination. We disagree. First, as noted above, there is no evidence that Midland was aware of any of the comments cited by Dr. Patel. Second, the undisputed evidence in the record defies any alleged custom of racial discrimination against Indians. At the time of his suspension, 59 of Midland's 329 physicians were of Indian descent, and roughly one hundred doctors had foreign degrees. Physicians of Indian descent have also served on hospital committees and in positions of authority. For example, Dr. Prem Gupta, a member of the MCC who voted in favor of suspending

Because Dr. Patel has failed to present sufficient evidence of pretext from which a rational factfinder could infer racial discrimination, the district court properly granted summary judgment to the Defendants on this issue.[21]

## V

Dr. Patel next argues that the district court erred in granting summary judgment to the Defendants on his federal and state antitrust claims. *See* 15 U.S.C. §§ 1 & 2; TEX. BUS. & COM. CODE ANN. § 15.05. Specifically, he argues that his suspension was the product of a conspiracy to monopolize the Midland market for the "performance of interventional and invasive cardiology services."[22] According

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Dr. Patel's privileges, is of Indian descent. The current Chief of Staff and Chairman of the MEC, Dr. Raj Reddy, is also of Indian descent.

[21] Because Dr. Patel has presented insufficient evidence of discrimination to survive summary judgment, we need not address the individual defenses raised by Midland and the doctors based on lack of causation and immunity.

[22] According to Dr. Patel, the relevant geographic market in this case is Midland, and the relevant product market is the "performance of interventional and invasive cardiology services." Dr. Patel avers that at the time his practice came under scrutiny in 1997, he (and the plaintiff-associations in which he has an interest) performed at least fifty percent of these services in Midland. Drs. Brown and Miller, both part of the Permian Cardiology Group at Midland, performed thirty-five to forty percent of these services. For purposes of this appeal, we assume *arguendo* that these averments are correct.

to Dr. Patel, the Defendants suspended him so that they could succeed to his market share and block the further expansion of his practice—including the opening of a new hospital to compete with Midland. Dr. Patel contends that the Defendants' actions caused injuries redressable by the antitrust laws because they essentially removed him from the market for eleven months, led to higher costs and fewer options for consumers, and delayed his plans to open a competing hospital.

To support his antitrust claim, Dr. Patel cites the same pattern of competition that he relied on in connection with his discrimination claim. *See infra* note 17 and accompanying text. According to Dr. Patel, after the Defendants' previous attempts to block the expansion of his practice failed, they resorted to directly attacking his clinical privileges. In addition to past examples of aggressive competition, Dr. Patel once again argues that the fact that he was not a danger further illustrates that his suspension was a "sham" undertaken to destroy his reputation and practice. Finally, Dr. Patel notes that at least some of his reviewers—specifically, Drs. Brown and Miller, both members of the Permian Cardiology Group—were cardiologists at Midland who directly competed with his cardiology practice.

The district court properly granted summary judgment to the Defendants on Dr. Patel's antitrust claims for three reasons. First, Dr. Patel has failed to present sufficient evidence from which a rational factfinder could conclude that he was suspended for anticompetitive reasons. To begin, the mere fact that Dr. Patel and Midland competed in the past does not itself support a finding that his suspension was a

sham. This is particularly true where, as here, the record supports the hospital's reasonable belief that Dr. Patel was a danger to patients at the time of his suspension.[23] Moreover, Dr. Patel's complaint that his direct competitors participated in his investigation is of little consequence here. It is inevitable in any peer review process that a physician's competitors will at some point be involved in the process. As Dr. Patel himself implicitly concedes, only specialists from the same field can fairly assess a physician's cases.[24] Finally, we note that the Defendants here took several steps to ensure that the quality of its peer review process was not tainted by competitive bias. Drs. Miller and Brown, though critical of Dr. Patel's cases, both recommended outside review before taking action against Dr. Patel. The hospital followed these recommendations and sought an outside review by Dr. Lange. In addition, Midland's procedures provided for review by doctors of various disciplines within the hospital. Furthermore, Dr. Patel's competitors did not control the ultimate decision to suspend his privileges.[25]

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[23] We also note the lack of evidence connecting this alleged "pattern" of anticompetitive behavior with the individual defendants in this case. At best, the evidence presented by Dr. Patel suggests that Dr. Rubin, who did not participate in the vote to suspend Dr. Patel, had some degree of involvement in Midland's competing ventures.

[24] One of Dr. Patel's key criticism of his reviewers is that they did not have sufficient expertise in invasive and interventional cardiology to fairly review his cases.

[25] Dr. Patel does not allege that any of the five members of the MCC who recommended suspension, or any of the eleven members of the MEC who voted to suspend him, were direct

Second, Dr. Patel's antitrust claims fail as a matter of law because he has not alleged a cognizable antitrust injury. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) ("Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful."). Dr. Patel's suspension did not eliminate him as a competitor. He still continued to treat many of his patients at another facility during the time of his suspension.[26] Moreover, his suspension did not permanently block his plans to open a new hospital, but at best delayed them.

Third, the Local Government Antitrust Act of 1984 (LGAA), and its Texas counterpart, bar Dr. Patel from recovering antitrust damages from Midland and its doctors acting in their official capacities. *See* 15 U.S.C. §§ 34-36 (2000); TEX. BUS. & COM. CODE ANN. § 15.05(g) (Vernon Supp. 2001). The LGAA provides, in relevant part:

> No damages, interest on damages, costs or attorney's fees may be recovered [for violations of antitrust laws] in any claim against a person based on any official action directed by a local government, or official or

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competitors. He simply makes broad accusations that, because of the hospital's history of competing with his new ventures, we should presume his suspension was the result of anticompetitive motives.

[26] Dr. Patel continued to treat several of his patients at Odessa Medical Center.

employee thereof acting in an official capacity.

15 U.S.C. § 36(a). Because it is undisputed that Midland is a political subdivision of the State of Texas, and that the doctors in this suit were acting as agents of the hospital when investigating Dr. Patel's cases, they are immune from antitrust liability.[27]

## VI

Lastly, Dr. Patel argues that the district court erred when it granted summary judgment to the Defendants on his three state law claims—breach of contract, tortious interference with contract relations, and defamation. We disagree.

First, Dr. Patel argues that Midland's bylaws constituted a contract between Midland and its doctors that was breached when he was suspended without first being afforded process. Specifically, Dr. Patel argues that, because he was not *actually* a danger, Midland's bylaws required that he be afforded notice and a hearing prior to the deprivation of his privileges. Even assuming the existence of a contract in this case, summary judgment was still proper on this claim because Midland's bylaws were not violated. Although Dr. Patel is correct that Midland's bylaws generally provide for notice and an opportunity to be heard prior to the deprivation of privileges, that is not the case where, as here, patient

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[27] Because we have already concluded that summary judgment was proper on these claims, we do not need to reach the Defendants remaining defenses based on sovereign immunity and the state-action doctrine.

safety is deemed to be at risk. Midland's bylaws specifically authorize summary suspension "whenever a practitioner's conduct requires that immediate action be taken to prevent immediate danger to . . . patients."

Second, Dr. Patel claims in vague terms that the Defendants defamed him by disseminating "false and defamatory per se publications to third parties." Specifically, he argues that these publications falsely stated that the summary suspension was justified to protect patient safety. Because we have already concluded that the MEC had reasonable grounds for concluding that Dr. Patel was a danger and thus that his summary suspension was justified under the circumstances, summary judgment was proper on this claim.[28] TEX. CIV. PRAC. & REM. CODE ANN. § 73.005 (Vernon 2001) ("The truth of the statement in the publication on which an action for libel is based is a defense to the action.").

Third, Dr. Patel claims that the Defendants, by illegally suspending him, interfered with his business and contractual relations with the hospital, as well as with his business relationships with other physicians, patients, and

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[28]In his response to Defendants' summary judgment motion, Dr. Patel asserted for the first time a claim for libel based on an "adverse action report" sent to the National Practitioner Data Bank stating that his noncardiac peripheral privileges had been "revoked" when they had only been suspended. Even if this claim was properly considered by the district court, Dr. Patel does not renew this claim in his brief on appeal. *See Cinel v. Connick*, 15 F.3d 1338, 1345 (5th Cir. 1994) ("A party who inadequately briefs an issue is considered to have abandoned the claim.").

insurance carriers. This claim also fails. To begin, we have already determined that Dr. Patel's suspension was not illegal. Moreover, we note that it is undisputed that Midland, through its agents, had a duty to engage in peer review of its physicians. Thus, as the district court correctly concluded, any contractual interference caused by Midland's exercise of this right with respect to Dr. Patel was justified. *See Friendswood Dev. Co. v. McDade & Co.*, 926 S.W.2d 280, 282 (Tex. 1996) ("A party is justified in interfering with another's contract if it exercises (1) its own legal rights or (2) a good faith claim to a colorable legal right, even though that claim ultimately proves to be mistaken.").

## VII

Finally, we note the Defendants' contention that they are immune to all of Dr. Patel's claims, except for his civil rights claims, under the Health Care Quality Improvement Act and the Texas Peer Review statutes. *See* HCQIA, 42 U.S.C. §§ 11101-11152 (providing immunity from damages to any person participating in a professional review action when the proceeding meets certain statutory requirements); Texas Medical Practice Act, TEX. OCC. CODE ANN. § 160.010(1) (Vernon 2001); TEX. HEALTH & SAFETY CODE ANN. § 161.033 (Vernon 2001) (providing immunity to members and agents of medical peer review committees absent a showing of malice). In addition, the Defendants argue that both the federal and the state statutes entitle them to attorneys' fees.[29]

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[29] Under HCQIA, a defendant who meets the standards for immunity under the statute and substantially prevails shall be

Because we agree with the district court's resolution of Dr. Patel's claims on the merits, we need not reach the issue of whether the HCQIA or the Texas Peer Review statutes immunize the Defendants in this case. As for the question of whether attorneys' fees should be awarded to Defendants, we remand this case to the district court for consideration of this issue.

## VIII

For the foregoing reasons, we AFFIRM the district court's grant of summary judgment to the Defendants on all of Dr. Patel's claims. We REMAND this case to the district court for a determination of their entitlement to attorneys' fees and defense costs under the HCQIA, 42 U.S.C. § 11113, and the Texas Peer Review statutes, TEX. OCC. CODE ANN. § 160.008(c).

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awarded costs, including reasonable attorneys' fees, "if the claim, or the claimant's conduct during the litigation of the claim, was frivolous, unreasonable, without foundation, or in bad faith." 42 U.S.C. § 11113. Under Texas's Peer Review statutes, a defendant may recover costs and attorneys' fees, if the plaintiff's suit was frivolous or brought in bad faith. TEX. OCC. CODE ANN. § 160.008(c) (Vernon 2001).

## APPENDIX C

**UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, MIDLAND DIVISION**

**NO. M 99 CA 159 SS**

**[Filed December 11, 2000]**

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| P.V. PATEL, M.D., et al. | ) |
| | ) |
| vs. | ) |
| | ) |
| MIDLAND MEMORIAL HOSPITAL, et al. | ) |
| | ) |

**JUDGES:**
SAM SPARKS, UNITED STATES DISTRICT JUDGE.

**AMENDED ORDER**

**BE IT REMEMBERED** that on the 12th day of October 2000 the Court held a hearing in the above-styled cause at which the parties appeared by representation of counsel and the Court considered Defendant Rubin, et al.'s Motion for Summary Judgment [# 30]; Defendant Midland Memorial Hospital's Motion for Summary Judgment [# 33]; Defendant Barnett, et al.'s Motion for Summary Judgment [# 66, # 82]; the plaintiffs' responses thereto; and the defendants' replies thereto. After considering the motions,

response and reply briefs, arguments of counsel, applicable law and case file as a whole, the Court enters the following opinion and order.

The plaintiffs -- P.V. Patel, M.D.; P.V. Patel, M.D., Professional Association; The Heart Center; Associates of Midland Cardiovascular & Internal Medicine, Professional Association; and Echo Lab, Inc. -- have filed suit against defendants Midland Memorial Hospital; Memorial Heart & Vascular Institute; Permian Cardiology Group; Stephen Brown, M.D.; Michael Miller, M.D.; James H. Barnett, M.D.; John Foster, Jr., M.D.; Jay Mendez, M.D.; Donald Loveman, M.D.; and Harold Rubin.[1] In essence, this is a denial of due process case, focusing on the January 1999 suspension of Dr. Patel by defendant Midland Memorial Hospital ("the Hospital").

**Factual Background**

Dr. Patel joined the Hospital in 1982, and is a board-certified cardiologist. In late 1997 and early 1998, the Hospital began receiving indications of "disruptive behavior" by Dr. Patel that was adversely affecting his medical practice. *See* Hospital's Summary Judgment Motion [# 33], Exs. 12-16. In April 1998, the Hospital formed an eight-person ad hoc executive committee to investigate this issue. Of these eight members, the only defendant on the ad hoc committee was Dr. Brown.

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[1] The plaintiffs have since dismissed defendants Barnett and Foster from this lawsuit.

On May 5, 1998, after reviewing three of Dr. Patel's cases, the ad hoc committee issued a report to the Hospital's Medical Executive Committee.[2] *See id.*, Ex. 18. The report was written by Dr. Marlon Hughes; Dr. Hughes is not a party to this lawsuit. The report concluded Dr. Patel had demonstrated "poor" and "inappropriate" procedures, techniques and decision-making in his practice and these problems had resulted in "catastrophic outcomes." *See id.* The report recommended Dr. Patel's "temporary privileges for non-cardiac peripheral angiography" be revoked. *See id.*

Also on May 5, 1998, the Medical Executive Committee held a regular meeting, at which Dr. Hughes presented the ad hoc committee's report regarding Dr. Patel. *See id.*, Ex. 19, at 3. At the meeting, the Executive Committee voted to suspend Dr. Patel's "peripheral" privileges and instructed the Hospital's Cardiovascular Committee to meet and further review Dr. Patel's practice. *See id.*, Ex. 19 and 26.

On May 7, 1998 Dr. Patel was formally informed of his suspension. *See id.*, Ex. 20. Dr. Patel immediately requested a hearing, but apparently Dr. Patel and his counsel repeatedly postponed the hearing date.

On June 2, 1998, the Hospital's Medical Executive Committee met once again, and decided to obtain outside reviews for three of Dr. Patel's cases. *See id.*, Ex. 22. The

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[2] The Medical Executive Committee was chaired by Dr. Foster. The plaintiffs dismissed Dr. Foster as a defendant in this lawsuit on March 22, 2000.

first outside review was done by Dr. Frank Rivera, of the Department of Radiology Imaging at Baylor University Medical Center in Dallas, Texas. On July 30, 1998, Dr. Rivera issued his report, concluding Dr. Patel "lacks the basic skills required for treatment of acute thrombos, thrombolysis, and performing advanced endovascular procedures." *See id.*, Ex. 23. There is no evidence in the record that Dr. Rivera was biased in any manner or otherwise predisposed against Dr. Patel. The second outside review was done by Dr. Robert Vogelzang, Professor of Radiology and Chief of Vascular & Interventional Radiology at Northwestern Memorial Hospital in Chicago, Illinois. On August 12, 1998, Dr. Vogelzang issued his report, concluding a "distressingly similar trend" existed in Dr. Patel's cases, that Dr. Patel "lacks basic technical skills," and that he "has had an unusually and unacceptably high rate of major complications and catastrophic outcomes." *See id.*, Ex. 24. There is no evidence in the record that Dr. Vogelzang was biased in any manner or otherwise predisposed against Dr. Patel.

During this time, the Hospital's Executive Committee also instructed Dr. Brown to perform an internal review of Dr. Patel's practice. After reviewing six of Dr. Patel's fatality cases, Dr. Brown issued his report sometime in July 1998. *See id.*, Ex. 27. Dr. Brown's report contained a number of criticisms of Dr. Patel's medical practice and ultimately recommended Dr. Patel's cases be sent outside the Hospital for further review. *See id.* Dr. Brown's report was sent only to Dr. Foster, the Chair of the Executive Committee; it was not shown to or discussed with Dr. Patel.

On September 28, 1998, Dr. Foster requested an outside review from Dr. Richard H. Lange, a highly-

renowned cardiovascular specialist and Director of the Cardiac Catheterization Laboratory at the University of Texas Southwestern Medical Center in Dallas, Texas. *See id.*, Ex. 28. Dr. Lange was provided with the files for ten of Dr. Patel's patients. Dr. Lange was not provided with Dr. Brown's July 1998 report.

On October 5, 1998, Dr. Foster, Dr. Mendez and Rubin met with Dr. Patel to discuss the suspension of his peripheral privileges. At the meeting, Dr. Patel was notified of the two outside reviews of his practice (the Rivera and Vogelzang reports), and was informed that the reviews were not favorable to Dr. Patel. *See id.*, Ex. 25. Also at the meeting, Dr. Patel's attorney again requested the Hospital postpone the hearing on Dr. Patel's suspension. *See id.*

At some point in October 1998, the Hospital's Cardiovascular Committee held its monthly meeting, at which the Committee reviewed fatalities in the Hospital's cardiovascular group. The Cardiovascular Committee was chaired by Dr. Brown, and included Dr. Miller. At the meeting, the Committee reviewed six recent fatalities in Dr. Patel's practice. *See id.*, Ex. 30. On November 6, 1998, the Cardiovascular Committee sent a memorandum to Dr. Foster, detailing the Committee's review of Dr. Patel at the October 1998 meeting. The memo, written primarily by Dr. Miller, characterized Dr. Patel's practice as "a very dangerous situation" and ultimately recommended Dr. Patel's cases be sent outside the Hospital for independent review. *See id.* Dr. Patel was not notified of the Cardiovascular Committee's memo.

On December 17, 1998, Dr. Foster forwarded the Cardiovascular Committee's memo to Dr. Loveman, Chairman of the Medical Control Committee, and requested the Control Committee perform an internal review and recommendation of Dr. Patel's practice. *See id.,* Ex. 31. On January 5, 1999, the Control Committee met to discuss Dr. Patel's practice. *See id.,* Ex. 32. The Committee decided to postpone any action because Dr. Lange's outside review was to arrive shortly. *See id.*

On January 13, 1999, Dr. Lange issued his report. *See id.,* Ex. 33. Dr. Lange concluded six of the ten patients reviewed died "as a direct result" of error by Dr. Patel. *See id.* Dr. Lange also identified six problem areas that demonstrated Dr. Patel's "poor medical judgment." *See id.* There is no evidence in the record that Dr. Lange was biased in any manner or otherwise predisposed against Dr. Patel. Dr. Patel was not informed of Dr. Lange's report.

On January 15, 1999, the Medical Control Committee held a meeting to review Dr. Lange's report and discuss Dr. Patel's practice. *See id.,* Ex. 34. Aside from Dr. Loveman (the Chair of the Control Committee), the only other defendant present at this meeting was Dr. Brown. The six-member Control Committee decided the Hospital's Executive Committee should review Dr. Lange's report, and recommended an immediate full suspension of Dr. Patel. *See id.* Dr. Patel was not informed of this recommendation.

On January 19, 1999, the Hospital's Executive Committee met to discuss the Control Committee's recommendation that Dr. Patel's full privileges be suspended. *See id.,* Ex. 35. The twelve-member Executive Committee

unanimously approved the recommendation to suspend Dr. Patel's full privileges at the Hospital. *See id.* The only defendants on the Executive Committee were Dr. Mendez and Dr. Loveman. Also present at this meeting were defendants Dr. Brown and Rubin. *See id.* Dr. Patel was notified of the suspension by Rubin and Dr. Mendez. Dr. Patel's patients at the Hospital were informed of the suspension by Dr. Mendez and Dr. Loveman. *See id.*

Dr. Patel immediately requested a full due process hearing on the suspension, and the Hospital agreed to provide such a hearing on February 2, 1999. Dr. Patel and his attorneys apparently did not want a hearing at that time, and postponed the hearing until August 1999.

The hearing began on August 23, 1999, and lasted ten days, stretching until October 20, 1999. *See id.*, Ex. 45. On November 3, 1999, the committee issued its report, finding the Hospital had acted reasonably in suspending Dr. Patel, based on the objective evidence at the time and in furtherance of quality health care. The committee also found Dr. Brown, Dr. Miller, and Dr. Lange (the outside reviewer) had not acted out of malice or an improper motive in issuing their reports and recommendations regarding Dr. Patel. The committee did find, however, that Dr. Patel had shown by a preponderance of the evidence that he did not perform his procedures with poor technical skills or judgment. The Committee recommended Dr. Patel's privileges be reinstated, with some slight restrictions on Dr. Patel's record-keeping practices. *See id.* The Hospital's trustees approved the recommendation on November 9, 1999 and Dr. Patel's privileges were reinstated. *See id.*, Ex. 46.

On December 22, 1999, the plaintiffs filed this lawsuit, alleging claims for: (1) denial of due process in violation of 42 U.S.C. § 1983; (2) racial discrimination in violation of 42 U.S.C. § § 1981 and 1983; (3) conspiracy to monopolize or attempt to monopolize in violation of federal and state antitrust laws; and (4) state law claims for breach of contract, defamation, and interference with business and contractual relations. The plaintiffs also seek a declaratory judgment that the Health Care Quality Improvement Act, 42 U.S.C. § 11111 is unconstitutional, and that the defendants are not entitled to immunity under this statute. The plaintiffs seek $ 20 million in actual damages, plus exemplary damages. The defendants seek summary judgment on all claims.

**Summary Judgment Standard**

Summary judgment may be granted if the moving party shows there is no genuine issue of material fact, and it is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 91 L. Ed. 2d 202, 106 S. Ct. 2505, 2513 (1986). In deciding summary judgment, the Court should "construe all facts and inferences in the light most favorable to the nonmoving party." *Hart v. O'Brien*, 127 F.3d 424, 435 (5th Cir. 1997), *cert. denied, 119 S. Ct. 868 (1999)*. The standard for determining whether to grant summary judgment "is not merely whether there is a sufficient factual dispute to permit the case to go forward, but whether a rational trier of fact could find for the nonmoving party based upon the record evidence before the court." *James v. Sadler*, 909 F.2d 834, 837 (5th Cir. 1990).

## Analysis

### I. Due Process

At the October 12, 2000 hearing, plaintiffs' counsel clarified the plaintiffs are not seeking § 1983 due process relief based on the May 1998 suspension of Dr. Patel's peripheral privileges. Rather, the plaintiffs are seeking § 1983 due process relief based solely on the alleged lack of due process provided before Dr. Patel's full privileges were suspended on January 19, 1999. Also at the hearing, plaintiffs' counsel clarified the plaintiffs are not challenging the due process provided after January 19, 1999, and in fact plaintiffs' counsel admitted due process was provided after this date.

Due process entitles a plaintiff who is a public employee with a property right in his employment to notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present the employee's side of the story. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 84 L. Ed. 2d 494, 105 S. Ct. 1487 (1985); *Spuler v. Pickar*, 958 F.2d 103, 107 (5th Cir.1992).[3] The Supreme Court has explained an "essential principle" of due process is that a deprivation of property must be preceded by notice and opportunity for hearing that is appropriate to the nature of the case. *See id.* However, "not even an informal hearing [] must precede a deprivation undertaken to protect the public safety." *Caine v. Hardy*, 943 F.2d 1406, 1412 (5th Cir. 1991)

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[3] The Court will assume, for purposes of this motion, that Dr. Patel has a property interest in his privileges at the Hospital.

(holding that, "because Dr. Caine was summarily suspended under exigent circumstances, it is plain that the *Mathews* balancing test forecloses any procedural due process claim"), *cert. denied*, 112 S. Ct. 1474 (1992); *see also Parratt v. Taylor*, 451 U.S. 527, 68 L. Ed. 2d 420, 101 S. Ct. 1908, 1915 (1981) ("Either the necessity of quick action by the State or the impracticality of providing any meaningful predeprivation process, when coupled with the availability of some meaningful means by which to assess the propriety of the State's action at some time after the initial taking, can satisfy the requirements of procedural due process."), *overruled in part on other grounds, Daniels v. Williams*, 474 U.S. 327, 88 L. Ed. 2d 662, 106 S. Ct. 662 (1986). Finally, a plaintiff's "assertion that he is the victim of partisan decisionmaking" is of no moment to a due process claim. *See Caine*, 943 F.2d at 1413. This is because, even assuming "the risk of erroneous decision presented by the participation of [plaintiff's] competitors in the decision to suspend his [hospital] privileges . . . this is a tolerable risk when compared with the state's powerful interest in protecting patient safety." *Id.*[4]

Here, as a matter of treating a seventeen-year member of the Hospital medical staff with respect, the Hospital should have called Dr. Patel in and discussed the various outside reviews and internal Committee reports with him before

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[4] *See also Daly v. Sprague*, 742 F.2d 896, 899 (5th Cir. 1984) ("The state has a legitimate interest, through continuing supervision, in maintaining the quality of medical care provided within its facilities.").

suspending all his hospital privileges.[5] However, as a matter of constitutional due process, the Hospital met its obligations. Specifically, the Court finds the objective evidence before the Hospital's Executive Committee on January 19, 1999, including the Rivera and Vogelzang independent outside reviews, the various Committee reports and recommendations, and finally the Lange independent outside review, reasonably justified suspension of Dr. Patel's full privileges without a hearing based on exigent circumstances -- a potential imminent danger to patient health and safety. Accordingly, under these circumstances, Dr. Patel's due process rights were not violated when the Hospital suspended his full privileges on January 19, 1999 without prior notice or hearing. *See Caine*, 943 F.2d at 1412-13; *Parratt*, 101 S. Ct. at 1915.

Aside from the lack of pre-suspension notice or hearing, Dr. Patel argues his January 19, 1999 suspension was improper because it was controlled by several of the individual defendants, who were biased against Dr. Patel either because of his national origin or otherwise. This

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[5] The record indicates Dr. Patel was not completely in the dark on this matter, contrary to his counsel's representations at the October 12, 2000 hearing. Dr. Patel clearly knew the Hospital was investigating his practice after the May 5, 1998 suspension of his peripheral privileges, and was given several opportunities to address the Hospital's concerns immediately after that suspension. In addition, the evidence shows Dr. Patel met with Dr. Foster, Dr. Mendez and Rubin on October 5, 1998, when he was informed of the Rivera and Vogelzang reports and told they were not favorable to him. *See* Hospital's Summary Judgment Motion, Ex. 25.

argument fails. First, because it reasonably appeared Dr. Patel posed an imminent threat to patient safety, the possibility that his suspension might have been driven by improper motives is "a tolerable risk when compared with the state's powerful interest in protecting patient safety." *Caine*, 943 F.2d at 1413. Second, the evidence of an improper motive by any of the individual defendants is weak, at best. Third, substantial objective evidence, independent of the defendants, existed as of January 19, 1999 to support the conclusion that Dr. Patel posed an imminent safety threat. Specifically, the Rivera, Vogelzang and Lange reviews were all conducted outside the Hospital, and it is not alleged that any of these reviewers acted out of an improper motive. Fourth, the record demonstrates the defendants, at best, only had partial control over the decisions at issue. The May 5, 1998 ad hoc committee that recommended Dr. Patel's peripheral suspension consisted of eight persons; only one of them is a defendant in this lawsuit. The ad hoc committee's report was written and presented to the Hospital's Executive Committee by Dr. Hughes, a nonparty. Similarly, many of the Hospital committee decisions (and the decision to retain Dr. Lange as an outside reviewer) were made by Dr. Foster, who is no longer a defendant. The Control Committee that recommended Dr. Patel's full suspension on January 15, 1999 consisted of six members, only one of whom is a defendant. And the ultimate decision on January 19, 1999 to suspend Dr. Patel's full privileges was made unanimously by a twelve-person Executive Committee. Only two of those committee members (Dr. Mendez and Dr. Loveman) are defendants.

Dr. Patel also argues he was denied due process because the Hospital violated its own bylaws in suspending his full privileges without prior notice and a pre-suspension

hearing. However, even assuming the Hospital violated its own rules, this does not, standing alone, amount to a due process violation. *See Ramirez v. Ahn*, 843 F.2d 864, 867 (5th Cir. 1988) ("Even if an action by a government entity violates its own rules or those of the state, there is no constitutional deprivation unless the conduct also trespasses on federal constitutional safeguards."); *Tonkovich v. Kansas Bd. of Regents*, 159 F.3d 504 (10th Cir. 1998) ("[A] university's failure to follow its established guidelines in overseeing a grievance 'does not in and of itself implicate constitutional due process concerns.'"). The Hospital's regulations provide that "summary suspension shall be initiated whenever a practitioner's conduct requires that immediate action be taken to prevent immediate danger to life, or injury to . . . patients." *See* Hospital's Summary Judgment Motion, Ex. 3, at IV-2. As discussed, it was reasonable as of January 19, 1999 for the Hospital to conclude Dr. Patel's practice constituted an imminent danger to patient health. Thus, the Hospital arguably was in full compliance with its bylaws when it summarily suspended Dr. Patel on January 19, 1999.

In sum, the defendants are entitled to summary judgment on the plaintiffs' due process claim.

**II. Racial Discrimination**

Dr. Patel is was born in India and is a naturalized U.S. citizen. The plaintiffs claim Dr. Miller "repeatedly used a racially derogatory comment directed at Dr. Patel" in 1997. *See* First Amendment Complaint [# 19] ("Complaint"), at 8 and 12-13. The plaintiffs further allege "Miller, Brown and Barnett used racially derogatory comments about Dr. Patel in

their conversations" and that, when Dr. Patel's full privileges were suspended in January 1999, Dr. Mendez told Dr. Patel "you foreign doctors are required to dot every i and cross every t, unlike non-foreign doctors." *See id.* Dr. Patel claims these defendants were instrumental in the peer review process that eventually led to his suspension. *See id.*

At the hearing, plaintiffs' counsel candidly acknowledged that the evidence of a custom of racial discrimination by the Hospital was weak. The Court agrees. As the undisputed summary judgment record shows, 51 of the 307 physicians on the Hospital's staff are of Indian descent, including the current Chief of Staff and Chairman of the Medical Executive Committee, Dr. Raj Reddy. *See* Rubin Affidavit P 63. Similarly, it is undisputed that a physician of Indian descent was a member of the Hospital Control Committee when it issued reports critical of Dr. Patel's practice and recommended in January 1999 that Dr. Patel's full privileges be suspended. *See* Loveman Affidavit P 15. The plaintiffs claim Dr. Miller used racial slurs and otherwise exhibited racial animosity towards Dr. Patel; the plaintiffs do not raise this claim as to any of the Executive Committee members. In addition, there is no evidence that any member of the Executive Committee used or even knew about Dr. Miller's alleged racial slurs. Moreover, as noted the individual defendants had only partial control, at best, of the decision to suspend Dr. Patel on January 19, 1999. Finally, the Hospital had legitimate, non-discriminatory reasons for its decision to suspend Dr. Patel's full privileges on January 19, 1999 -- namely, the independent outside reviews of Dr. Lange, Dr. Rivera and Dr. Vogelzang. The plaintiffs have offered no evidence that would even tend to show these reports were pretextual. Therefore, the defendants also are

entitled to summary judgment on the plaintiffs' racial discrimination claims. *See Wallace v. Texas Tech Univ., 80 F.3d 1042 (1996)* (stating that to succeed on claim of intentional discrimination under Section 1981 or 1983, plaintiff must offer proof that defendants' legitimate proffered reasons for conduct are pretextual).

**III. Conspiracy to Monopolize**

The plaintiffs also allege the defendants violated the Sherman Antitrust Act by conspiring to monopolize the Midland market for the "performance of interventional and invasive cardiology services." *See* Complaint, at 9.[6] The plaintiffs claim the defendants effected this conspiracy by: (1) using unqualified and prejudiced reviewers to "engage in false and malicious peer review" of Dr. Patel; (2) suspending Dr. Patel in violation of hospital bylaws; (3) engaging in "an illegal boycott" of Dr. Patel; (4) "threatening a cardiologist with peer review for using [Dr. Patel's] cardiac catheterization laboratory"; and (5) "threatening to ruin the business of a cardiovascular surgeon if he testified for Dr. Patel in his peer review case." *See id.* at 5 and 10-11. The defendants are entitled to summary judgment on these claims.

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[6] The plaintiffs contend the relevant geographic market is the city of Midland, Texas and the relevant product market is the "performance of interventional and invasive cardiology services." *See* Complaint, at 9. The plaintiffs claim they performed at least 50% of these services in Midland, while the Hospital, Permian Cardiology Group, and Memorial Heart and Vascular Institute performed 35% to 40% of these services in Midland. *See id.* The Court makes no determination regarding the validity of these alleged markets.

With respect to the first allegation, the Court has already determined the peer review of Dr. Patel was objectively reasonable, and at best was controlled by the defendants only in part. While it is true some of the individual defendants were direct competitors of Dr. Patel, there is no allegation (much less any evidence) the outside reviewers who criticized Dr. Patel -- Dr. Lange, Dr. Rivera and Dr. Vogelzang -- were in competition with the plaintiffs in any manner. With respect to the second allegation, the Court has already determined the Hospital did not violate its bylaws when it suspended Dr. Patel in January 1999, because of the Hospital's objectively reasonable belief that Dr. Patel posed an immediate threat to patient safety at that time. With respect to the third allegation, the plaintiffs have presented insufficient evidence to support a finding of conspiracy to monopolize. Moreover, the alleged "boycott" by the defendants dates primarily from the late 1980s to the mid 1990s, is supported solely by Dr. Patel's affidavit and by hearsay, and is not linked to the main issue in this case -- Dr. Patel's January 19, 1999 suspension. With respect to the fourth and fifth allegations -- alleged threats to two cardiologists -- there is no evidence of how these isolated threats created a "dangerous probability of monopolization" in the alleged relevant market. *See Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 122 L. Ed. 2d 247, 113 S. Ct. 884, 890-91 (1993) (holding "that to demonstrate attempted monopolization a plaintiff must prove . . . a dangerous probability of achieving monopoly power" in the relevant market). Finally, the plaintiffs have presented no evidence of antitrust injury, which is required to succeed on a Sherman Act claim. *See Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 93 L. Ed. 2d 427, 107 S. Ct. 484, 489 (1986). Indeed, it appears Dr. Patel could and does practice outside

the plaintiffs' alleged geographic market. For these reasons, the defendants are entitled to summary judgment on the plaintiffs' antitrust claim.

In addition, the Hospital and the individual defendants are entitled to immunity from any antitrust damages in this lawsuit. The Local Government Antitrust Act provides that "no damages, interest on damages, costs, or attorney's fees may be recovered under . . . the Clayton Act from any local government, or official or employee thereof acting in an official capacity."[7] 15 U.S.C. § 35(a). The term "local government" is defined to include "a special function governmental unit established by State law." *See* 15 U.S.C. § 34(1)(B). It is uncontested that the Hospital is a political subdivision of the State organized under State law, and that the individual defendants were acting as agents of the Hospital in performing their peer reviews of Dr. Patel. *See* Complaint, at 13 ("The Defendant physicians are state actors since they acted within the scope of their advisory authority or delegated supervisory authority in this publicly operated hospital."). Accordingly, the Hospital and the individual defendants are immune from damages for the plaintiffs' antitrust claims. *See* 15 U.S.C. § 35(a); *see also Sweeney v. Athens Regional Med. Ctr.*, 705 F. Supp. 1556, 1561-62 (M.D. Ga. 1989) (holding state hospital was special governmental unit entitled to antitrust immunity under Local Government Antitrust Act).

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[7] The Local Government Antitrust Act speaks to immunity from damages under the Clayton Act, while the plaintiffs' antitrust claims are brought under the Sherman Act. However, "Section 4 of the Clayton Act is the damages remedy for violations of the Sherman Act." *Palm Springs Med. Clinic, Inc. v. Desert Hosp.*, 628 F. Supp. 454, 458 (C.D. Cal. 1986).

**IV. State Law Claims**

Finally, the plaintiffs raise three pendent state law claims -- breach of contract, defamation, and interference with business relations. First, the plaintiffs claim the Hospital breached its contractual obligation, imposed by its bylaws, to provide prior notice and an opportunity to be heard before the "summary suspension" of Dr. Patel. *See* Complaint, at 15. However, the Court has already determined the Hospital did not violate its bylaws in that instance; the defendants therefore are entitled to summary judgment on this claim.

Second, the plaintiffs claim the defendants "published false and defamatory per se" statements to each other, to Dr. Patel's patients and referring doctors, and to the State Medical Board that Dr. Patel "was incompetent and a danger to his patients." *See* Complaint, at 15-16. This claim fails because the Court has already determined it was objectively reasonable to suspend Dr. Patel's full privileges on January 19, 1999, based on the objective and independent information available to the defendants at the time, that Dr. Patel posed a potential "danger to his patients." In their response brief, the plaintiffs raise the new claim that the Hospital committed libel when it published on January 22, 1999, to the National Practitioner Data Bank, that the Hospital's Executive Committee had "voted to revoke" Dr. Patel's peripheral privileges on May 5, 1998. *See* Hospital's Summary Judgment Motion, Ex. 26. The plaintiffs claim this statement is false because the Executive Committee only had authority to recommend revocation, not to actually revoke. However, this argument does not undermine the veracity of the Hospital's January 22, 1999 statement -- regardless of whether it had the authority to actually revoke, the Executive

Committee did indeed "vote" to revoke on May 5, 1998. *See id.; see also id.*, Ex. 20 (May 7, 1998 letter to Dr. Patel, stating that Executive Committee had "voted to revoke" Dr. Patel's peripheral privileges). The defendants also are entitled to summary judgment on the plaintiffs' defamation claims.

Finally, the plaintiffs claim the defendants' above conduct, and in particular the January 1999 suspension, has interfered with the plaintiffs' contractual and business relations and has caused the plaintiffs to lose patients. *See* Complaint, at 16. However, it is undisputed that the Hospital, through the use of the individual defendants as its agents, has the right -- indeed the duty to the public -- to engage in peer review of its physicians. Therefore, any contractual interference caused by the Hospital's exercise of this right with respect to Dr. Patel was justified. *See Friendswood Dev. Co. v. McDade & Co.*, 926 S.W.2d 280, 282, 39 Tex. Sup. Ct. J. 874 (Tex. 1996) ("A party is justified in interfering with another's contract if it exercises (1) its own legal rights or (2) a good faith claim to a colorable legal right, even though that claim ultimately proves to be mistaken."). Moreover, the Court has already determined the ultimate result of the peer review process -- suspending Dr. Patel -- was reasonable at the time. The defendants also are entitled to summary judgment on this claim.

**V. Declaratory Judgment**

Because the Court's decision does not implicate the Health Care Quality Improvement Act, 42 U.S.C. § 11111, the Court will not address the statute's constitutionality or whether the defendants are entitled to immunity under the statute.

In accordance with the foregoing, the Court enters the following orders:

IT IS ORDERED that Defendant Rubin, et al.'s Motion for Summary Judgment [# 30] is GRANTED;

IT IS FURTHER ORDERED that Defendant Midland Memorial Hospital's Motion for Summary Judgment [# 33] is GRANTED;

IT IS FURTHER ORDERED that Defendant Barnett, et al.'s Motions for Summary Judgment [# 66, # 82] are GRANTED; and

IT IS FURTHER ORDERED that all remaining pending motions are DISMISSED AS MOOT.

SIGNED on this the 5th day of December 2000.

/s/ _____
SAM SPARKS
UNITED STATES DISTRICT JUDGE